

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JUSTIN E. LEWIS,

Plaintiff,

CRAIG FERGUSON,

Defendant.

CASE NO. 3:19-cv-05108-BHS-JRC

ORDER ADOPTING REPORT AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation ("R&R")

of the Honorable J. Richard Creatura, United States Magistrate Judge, Dkt. 36, and

Plaintiff's objections to the R&R, Dkt. 37.

Plaintiff initiated this matter on February 15, 2019, alleging use of excessive force

and violation of his First Amendment rights. Dkt. 5. After a motion to dismiss, this

Court dismissed Plaintiff's First Amendment claim with leave to amend and granted

leave to amend Plaintiff's claim for excessive force. Dkt. 23. Plaintiff filed an amended

complaint on December 11, 2019, Dkt. 30. The amended complaint contains expanded

allegations regarding Plaintiff's First Amendment claims. *Id.* However, it does not

allege facts supporting Plaintiff's excessive force claims; instead, Plaintiff simply stated

1 that he would “like to have the right to proceed on the excessive force claim as is already
2 written.” Dkt. 30 at 4. As the Magistrate Judge noted in the R&R, this omission appears
3 to have resulted from Plaintiff’s lack of understanding that the amended complaint would
4 fully supersede the original complaint and that he therefore needed to re-allege facts
5 supporting his excessive force claims. Dkt. 36 at 7–8.

6 On December 20, 2020, Defendants moved to dismiss the amended complaint.
7 Dkt. 31. Plaintiff filed an opposition, Dkt. 33 and Defendants replied, Dkt. 34. On
8 March 16, 2020, Magistrate Judge Creatura issued the R&R, which recommends
9 dismissal with prejudice of plaintiff’s First Amendment claim and dismissal of the
10 excessive force claim with leave to amend. Dkt. 36. On March 31, 2020, Plaintiff filed
11 objections to the R&R. Dkt. 38.

12 The district judge must determine de novo any part of the magistrate judge’s
13 disposition that has been properly objected to. The district judge may accept, reject, or
14 modify the recommended disposition; receive further evidence; or return the matter to the
15 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

16 Plaintiff’s objections do not respond substantively to the R&R. Dkt. 37. Instead,
17 Plaintiff complains of mental health issues and difficulty gaining sufficient access to “law
18 work time.” *Id.* It appears that Plaintiff’s concerns relate primarily to delay in accessing
19 legal resources and can be addressed by granting him additional time in which to amend
20 his complaint. Accordingly, the Court will grant Plaintiff 60 days in which to file an
21 amended complaint.

The Court having considered the R&R, Plaintiff's objections, and the remaining record, does hereby find and order as follows:

- (1) The R&R is **ADOPTED**;
 - (2) Defendant's motion to dismiss, Dkt. 31, is **GRANTED** with respect to Plaintiff's First Amendment claim;
 - (3) Plaintiff's First Amendment claims are **DISMISSED with prejudice**;
 - (4) Plaintiff's claim for use of excessive force is **DISMISSED without prejudice**;
 - (5) Plaintiff is granted leave to amend his complaint to allege claims for excessive force; Plaintiff shall file an amended complaint or otherwise respond no later than June 23, 2020; and
 - (6) This matter is re-referred to Magistrate Judge Creatura for further proceedings.

Dated this 27th day of April, 2020.


BENJAMIN H. SETTLE
United States District Judge